IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN HITCHENS	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNTY OF MONTGOMERY, et al.	:	NO. 00-4282

MEMORANDUM AND ORDER

HUTTON, J. July 31, 2002

Currently before the Court is Defendants' uncontested Motion for Leave to File a Memorandum of Law Addressing the Estoppel Effect of the Decision of the Pennsylvania Labor Relations Board and Renewed Motion for Summary Judgment or Alternatively, Motion for Reconsideration and Defendants' Memorandum of Law Addressing the Estoppel Effect of the Decision of the Pennsylvania Labor Relations Board on Plaintiff Hitchens (Docket No. 17). For the reasons stated below, Defendants' Motion for Leave to File a Memorandum of Law is **GRANTED**, and Defendants' Renewed Motion for Summary Judgment is also **GRANTED**.

I. BACKGROUND

On August 22, 2000, Plaintiff Stephen Hitchens ("Plaintiff") filed the instant action against Montgomery County, the Montgomery County Correctional Facility (the "MCCF"), Warden Lawrence Roth, Deputy Warden Julio Algarin and Eric Echavarria (collectively, the "Defendants") for a violation of Plaintiff's rights under the

United States Constitution and various state laws. Plaintiff worked as a correctional officer at the MCCF from 1993 until his termination on May 3, 2000. In 1999, Plaintiff was one of seven or eight correctional officers involved in pro-unionization activities at the MCCF. Specifically, Plaintiff distributed union authorization cards in the parking lot of Facility after working hours.

During October of 1999, Plaintiff received warnings about the MCCF's facial hair policy that prohibited employees from wearing a beard. Sometime in 1999, Plaintiff had been sent home to shave off his goatee. Again, after roll call on May 3, 2000, Plaintiff was notified that he needed to shave and remove his five o'clock shadow. While on his way home to shave, Plaintiff was told he violated his duties and was subsequently discharged for violating the policy.

Shortly thereafter, Plaintiff commenced the instant action by filing a five-count complaint alleging that Defendants violated his rights under 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, 1988 and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. In addition, Plaintiff also claims violations under various state laws. Defendants moved for summary judgment on all of Plaintiff's claims. On February 20, 2002, the Court granted Summary Judgment in favor of Defendants on all claims except Plaintiff's First Amendment claim for retaliation. See Hitchens v.

County of Montgomery, Civ. A. No. 00-4282, 2002 WL 253939 (E.D. Pa. Feb. 20, 2002).

Previously, on August 4, 2000, Plaintiff's Union had filed a Charge of unfair labor practice with the Pennsylvania Labor Relations Board ("PLRB") on his behalf claiming that Montgomery County violated the Pennsylvania Public Employees Relations Act when the County terminated Plaintiff, an alleged union organizer. In a Proposed Decision and Order dated January 14, 2002, the Charge against Montgomery County was dismissed. Following the issuance of the Proposed Decision and Order, Defendants then filed the instant Renewed Motion for Summary Judgment on March 6, 2002 asserting that Plaintiff's remaining First Amendment claim is now barred under the doctrine of issue preclusion. Plaintiff has failed to respond to the instant Motion.[1]

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

[1] As a result of the Plaintiff's failure to respond to the Defendants' motion, the Court could treat this motion as uncontested pursuant to Rule 7.1(c) of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania. E.D. Pa. R. Civ. P. 7.1(c). Rule 7.1(c) states that, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested . . . ." Id. Defendants filed the instant motion on March 6, 2002. Plaintiff not only failed to respond to this motion within fourteen days, Plaintiff has failed to respond to this motion entirely.

to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials or vague statements. Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001).

III. DISCUSSION

In their Renewed Motion for Summary Judgment, Defendants argue that the doctrine of issue preclusion, or collateral estoppel, bars Plaintiff's remaining First Amendment retaliation claim. See Defs.' Renewed Mot. Summ. J. at 1. In support of this assertion, Defendants rely on the administrative proceedings before the PLRB in which the Hearing Examiner concluded that Plaintiff never discussed union representation with any superior and that Montgomery County did not have any knowledge of Plaintiff's protected activity. See id. at 15. Thus, the issue now before the Court is whether the doctrine of issue preclusion bars consideration of Plaintiff's First Amendment claim for retaliation under 42 U.S.C. § 1983 because the same issues were resolved in a prior unreviewed administrative determination.

A. Issue Preclusion

Issue preclusion, or collateral estoppel, precludes litigation of identical issues adjudicated in a prior action against the same party or a party in privity. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); see also Delaware River Port Auth. v. Fraternal Order of Police, 290 F.3d 567, 572 (3d Cir. 2002) ("Under the doctrine of issue preclusion, a determination by a court of competent jurisdiction on an issue necessary to support its judgment is conclusive in subsequent suits based on a cause of action involving a party or one in privity.").

In short, "issue preclusion prevents relitigation of the same issues in a later case." Delaware River Port Auth., 290 F.3d at 572. Moreover, under 28 U.S.C. § 1738, the Full Faith and Credit Act, federal courts must give state court decisions the same preclusive effect as they would be given "in the courts of the rendering state." Id. at 572-73.

When determining a law's preclusive effect, a federal court must look to the law of the adjudicating state. Id. (citing Greenleaf v. Garlock, Inc., 174 F.3d 352, 357 (3d Cir. 1999)). In order for issue preclusion to apply under Pennsylvania law, four factors must be present: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action. See id. at 525; Dam Things from Denmark v. Russ Berrie & Co., Inc., 290 F.3d 548, 559 n.15 (3d Cir. 2002); Raytech Corp. v. White, 54 F.3d 187, 190 (3d Cir. 1995). It is well established that federal courts must give preclusive effect to unreviewed administrative findings under federal common law rules of preclusion. See Univ. of Tennessee v. Elliott, 478 U.S. 788, 106 S.Ct. 3220, 3224, 92 L.Ed.2d 635 (1986). In the instant case, Defendants claim that the application of issue preclusion principles requires the dismissal of Plaintiff's remaining First Amendment claim. See Defs.' Renewed Mot. Summ. J. at 6.

1. Issue Actually Litigated

First, Defendants claim that the first element of issue preclusion is satisfied because the issue that was before the PLRB is identical to the issue now before this Court on Plaintiff's First Amendment claim. See id. at 9 (citing St. Joseph's Hosp. V. PLRB, 373 A.2d 1069 (1977)). "'Identity of the issue is established by showing that the same general rules govern both cases and that the facts of both cases are indistinguishable as measured by those rules.'" Suppan v. Dadonna, 203 F.3d 228, 233 (3d Cir. 2000) (citing 18 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice & Procedure, § 4425, at 253 (1981)). The burden is on the moving party to demonstrate that the "issue actually litigated" in a previous action is identical to the current issue before the court. See id. "To defeat a finding of identity of the issues for preclusion purposes, the difference in the applicable legal standards must be 'substantial.'" Raytech Corp. v. White, 54 F.3d 187, 191 (3d Cir. 1995) (quoting 1B Moore's Federal Practice ¶ 443(2), at 572).

When Plaintiff's union was before the PLRB on the unfair labor practice charge, the union shouldered the burden to establish "(1) that the employees engaged in protected activity; (2) that the employer was aware of the protected activity; and (3) but for the protected activity, the employer would not have taken the detrimental action." Defs.' Renewed Mot. Summ. J., Ex. 2

("Proposed Order and Decision"), at 2. The Third Circuit has recognized a similar three-step framework for the analysis of First Amendment retaliation claims. See Baldassare v. State of New Jersey, 250 F.3d 188, 194-95 (3d Cir. 2001); Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000). First, Plaintiff must establish that he engaged in speech or an activity protected by the First Amendment. See Baldassare, 250 F.3d at 195. Second, Plaintiff must "show the protected activity was a substantial or motivating factor in the alleged retaliatory action." Id. Third, "the public employer can rebut the claim by demonstrating 'it would have reached the same decision . . . even in the absence of the protected conduct.'" Id.

The Court concludes that "issue actually litigated" before the PLRB is the same as Plaintiff's remaining First Amendment retaliation claim before this Court. The undisputed evidence of record shows that the PLRB evaluated the same tripartite framework this Court would be called upon to evaluate under Plaintiff's First Amendment retaliation claim. Moreover, in this case, the same legal issues arose from the same factual context and Plaintiff does not allege any new facts or provide additional evidence in support of his First Amendment claim that was not before the PLRB. The basis for Plaintiff's First Amendment retaliation claim is that he was terminated because his supervisors were aware of his efforts to form a union at the Montgomery County Correctional Facility. This

same allegation formed the basis for Plaintiff's unfair labor practice charge. See Stokes v. Bd. of Tr. of Temple Univ., 683 F.Supp. 498, 502 (E.D. Pa. 1988), aff'd, 872 F.2d 413 (3d Cir. 1989). Accordingly, the first prong of the issue preclusion analysis is met.

2. Final Adjudication on the Merits

Next, Defendants contend that the PLRB decision constitutes a final and valid judgment. See Defs.' Renewed Mot. Summ. J. at 10. Under 34 Pa. Code Sec. 95.98(a), a Proposed Determination and Order of a Hearing Examiner becomes final within twenty (20) days of the date of the order so long as no exceptions are filed. See Philadelphia Hous. Auth. v. Pennsylvania Labor Relations Bd., 620 A.2d 594, 597 n.5 (Pa. Commw. Ct. 1993). As the Commonwealth Court of Pennsylvania explained:

> The Board itself is vested with the ultimate authority to determine if there has been an unfair labor practice. However all formal hearings are conducted by a hearing examiner designated by the Board, whose proposed decision to the Board will become final if no exceptions are filed within twenty days, or unless the Board itself on its own motion determines to review the proposed decision.

Id. (citations omitted). In this case, the uncontested evidence of record shows that Plaintiff's Union did not file any exceptions to the Hearing Examiner's Proposed Decision and Order. Therefore, under Pennsylvania law, the decision of the PLRB is a final decision. See 34 Pa. Code Sec. 95.98(a); Philadelphia Hous. Auth., 620 A.2d at 597 n.5. Accordingly, the second requirement of

the issue preclusion has been fulfilled.

3. Issue Essential to Prior Judgment

The third element that must be met in order for issue preclusion to apply requires Defendants to show that the issue decided before the PLRB was essential to the PLRB's ruling. The Third Circuit recently described the reasoning of this third element as follows:

> "[I]f issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. . . In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation."

Nat'l R.R. Passenger Corp. v. Pennsylvania Public Util. Com'n, 288 F.3d 519, 527 (3d Cir. 2002) (quoting Restatement (Second) of Judgments § 27, cmt. h). Accordingly, under this prong, the Court must determine "whether the issue 'was critical to the judgment or merely dicta.'" Id. (citing O'Leary v. Liberty Mut. Ins. Co., 923 F.2d 1062 (3d Cir. 1991)).

Here, it is clear that the Hearing Examiner's determination that the County was unaware of Plaintiff's unionization activities was not mere dicta, but rather was essential to a finding that the County had not committed unfair labor practices. As discussed above, for the PLRB to have found a violation of the Pennsylvania Public Employee Relations Act, the Union had to show "(1) that the employees engaged in protected activity; (2) that the employer was

aware of the protected activity; and (3) but for the protected activity, the employer would not have taken the detrimental action." Defs.' Renewed Mot. Summ. J., Ex. 2 ("Proposed Order and Decision"), at 2. Thus, the PLRB's findings that Plaintiff's employer was unaware of the protected activity engaged in by Plaintiff, was essential to the judgment. Moreover, the PLRB procedures "provide a full and fair opportunity to litigate contested issues . . .." See Stokes v. Bd. of Tr. of Temple Univ., 683 F.Supp. 498, 502 (E.D. Pa. 1988), aff'd, 872 F.2d 413 (3d Cir. 1989). At the hearing, Plaintiff testified, called witnesses and had the opportunity to cross-examine the County's witnesses. Accordingly, the third requirement of issue preclusion has been met.

4. Same Parties or Their Privities

The fourth and final element of issue preclusion requires the Court to find that same parties or their privities were fully represented in the prior action. See Nat'l R.R. Passenger Corp. v. Pennsylvania Public Utility Com'n, 288 F.3d 519, 525 (3d Cir. 2002). In the instant case, Plaintiff's Union prosecuted the action before the PLRB on his behalf. See Defs.' Renewed Mot. Summ. J., Ex. 2 ("Proposed Order and Decision"), at 1. Courts in this Circuit have routinely held that a decision against a union can bind union members in a subsequent action. See, e.g., Handley v. Phillips, 715 F.Supp. 657, 666-67 (M.D. Pa. 1989) (plaintiff

union member collaterally estopped from relitigating terms of collective bargaining agreement where union had raised the issue in arbitration and in state court and where plaintiff had opportunity to assert her rights as union member); Stokes, 683 F.Supp. at 502 (union prosecuting action on behalf of members deemed to be in privity with them for purposes of collateral estoppel, even though plaintiffs were not parties to action). Moreover, the individual defendants in the instant case, Warden Lawrence Roth, Deputy Warden Julio Algarin and Eric Echavarria, are in privity with the County, and thus their personal capacity suits are also barred by the PLRB decision. See Jones v. Holvey, 29 F.3d 828, 839 (3d Cir. 1994). Therefore, the Court finds that the fourth and final element of issue preclusion has been met.

IV. CONCLUSION

In this Court's Memorandum and Order regarding Defendants' first Motion for Summary Judgment, the Court found that "Plaintiff's termination could reasonably raise an inference that the Plaintiff was being disciplined for his unionization efforts," and thus denied summary judgment as to Plaintiff's First Amendment retaliation claim. See Hitchens v. County of Montgomery, Civ. A. No. 00-4282, 2002 WL 253939, at *6 (E.D. Pa. Feb. 20, 2002). The PLRB, however, has since decided that there is "no evidence that the County was aware of [Plaintiff's unionizing] activity." Defs.' Renewed Mot. Summ. J., Ex. 2 ("Proposed Order and Decision"), at 2.

Under the doctrine of issue preclusion, this Court must give "the same preclusive effect to a state court judgment as do the courts of the state where the judgment was rendered. Pennsylvania courts give PLRB decisions preclusive effect both as to findings of facts and conclusions of law." Grier v. Philadelphia Hous. Auth., Civ. A. No. 93-5625, 1995 WL 80096, at *4 (E.D. Pa. Feb. 27, 1995). Because Defendants have met their burden of demonstrating that all four elements of issue preclusion apply to the instant case, the Court must give preclusive effect to the PLRB's findings. Thus, Plaintiff is unable to maintain his First Amendment claim for retaliation. Accordingly, the Court grants Defendants' uncontested Renewed Motion for Summary Judgment.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN HITCHENS	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNTY OF MONTGOMERY, et al.	:	NO. 00-4282

O R D E R

AND NOW, this 31st day of July, 2002, upon consideration of Defendants' uncontested Motion for Leave to File a Memorandum of Law Addressing the Estoppel Effect of the Decision of the Pennsylvania Labor Relations Board and Renewed Motion for Summary Judgment or Alternatively, Motion for Reconsideration and Defendants' Memorandum of Law Addressing the Estoppel Effect of the Decision of the Pennsylvania Labor Relations Board on Plaintiff Hitchens (Docket No. 17), IT IS HEREBY ORDERED that:

(1) Defendants' Motion for Leave to File a Memorandum of Law is **GRANTED**;

(2) Defendants' Memorandum of Law Addressing the Estoppel Effect of the Decision of the Pennsylvania Labor Relations Board and Renewed Motion for Summary Judgment or Alternatively, Motion for Reconsideration shall be deemed to have been filed on March 6, 2002;

(3) Defendants' Renewed Motion for Summary Judgment is **GRANTED;**

IT IS FURTHER ORDERED that Judgment is entered in favor of Defendants.

BY THE COURT:

_____

HERBERT J. HUTTON